

Balancing view-points: religious or philosophical belief in conflict with transgenderism

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20 December 2019

Balancing different views and opinions in the workplace can be challenging at the best of times – but even more so when individuals express views which can be offensive to others but cite the protection of equalities legislation. The issue has previously arisen with clashes between religion and sexual orientation but has once again fallen under the spotlight in two recent first-instance Tribunal decisions dealing with conflicts between religious or philosophical belief and transgenderism.

Background Facts

Mackereth v The Department for Work and Pensions (DWP) and Advanced Personnel Management Group (UK) Limited (APM)

Dr Mackereth was a health care professional recruited by APM to undertake a role as a Health and Disabilities Assessor on behalf of the DWP. Dr Mackereth argued that, as a result of his beliefs, he could not refer to individuals who were contemplating or undergoing, or who had undergone, gender reassignment using the pronoun of the person's choice, as required by the DWP.

The beliefs relied on by Dr Mackereth were:

1. His belief in the truth of the Bible and in particular the truth of Genesis 1:27 – that every person is created by God as either male or female and cannot change their sex/gender at will.
2. His lack of belief that (i) it is possible for a person to change their sex/gender; (ii) impersonating the opposite sex might be beneficial for an individual's welfare; and (iii) society should accommodate and/or encourage anyone's impersonation of the opposite sex.
3. His belief that it would be irresponsible and dishonest for someone such as a health care professional to accommodate and/or encourage such impersonation.

Forstater v CGD Europe, Centre for Global Development and Masood Ahmed

Ms Forstater had been a Visiting Fellow and had entered into consultancy agreements with CGD Europe and/or the Centre for Global Development since January 2015. The last consultancy agreement ended on 31 December 2018 and Ms Forstater argued that it had come to an end (or there had been a refusal to continue it) because she expressed "gender critical" opinions. The case concerned a large number of comments expressed by Ms Forstater on Twitter.

There was some discussion within the Tribunal's judgment as to what constituted Ms Forstater's belief, and what was instead an expression of that belief. The core belief identified by the Tribunal was that there are only two sexes – male and female – and it is impossible to change sex. It is sex that is fundamentally important, rather than gender, gender identity or gender expression.

There was some debate as to whether Ms Forstater had a lack of belief that a trans woman is a woman and a trans man is a man, or an actual belief that a trans woman is a man and a trans man is a woman. However, whichever way the belief or lack thereof was expressed, the outcome of the Tribunal's decision was the same.

Philosophical Beliefs

In the case of *Grainger v Nicholson*, extensive guidance was given as to the meaning of “philosophical belief”:

1. The belief must be genuinely held;
2. It must be a belief and not an opinion or viewpoint;
3. It must be a belief as to a weighty and substantial aspect of human life and behaviour;
4. It must attain a certain level of cogency, seriousness, cohesion and importance; and
5. It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others.

Were the beliefs “protected characteristics”?

Both Dr Mackereth and Ms Forstater were unsuccessful in their Tribunal claims. In both cases, the Tribunals found that the beliefs relied upon were not protected.

Each of the beliefs relied upon were held by the Tribunals to be incompatible with human dignity and conflict with the fundamental rights of others. The refusal to use an individual's preferred pronoun, or insisting on their sex assigned at birth, was held to be likely to cause offence (and in fact, both Dr Mackereth and Ms Forstater accepted their comments or approach could be hurtful or offensive to others) and have the effect of violating their dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment (the very definition of harassment) – and such an approach was not worthy of respect in a democratic society.

The impact on freedom of expression

Freedom of expression is not an absolute right – it is qualified and the approach of the Tribunals in both cases is consistent with the principle that people cannot expect to be protected if their core belief involves violating the dignity of others, and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

In *Forstater*, the Tribunal was at pains to point out that there was nothing to stop Ms Forstater continuing to campaign against the proposed revision to the Gender Recognition Act to be based more on self-identification (rather than requiring a medical diagnosis of gender dysphoria), nor to her putting forward her opinion that there should be some spaces that are limited to women assigned female at birth where it is a proportionate means of achieving a legitimate aim. However, she could do this without insisting on calling trans women men. There would be many circumstances where it would not be necessary to refer to sex at all. Where it was necessary, then the Tribunal held that requiring Ms Forstater to refer to a trans woman as a woman was justified to avoid harassment of that person.

As these cases are first instance decisions, they are not binding but are persuasive as to how these issues will be handled.

Both Dr Mackereth and Ms Forstater have indicated that they are considering the judgments and whether or not to appeal.

Managing conflicts in the workplace

Employees are entitled to their own beliefs, views and opinions. It is the manifestation of those beliefs that can cause issues – sometimes (as with Ms Forstater and Dr Mackereth) employees may seek to exercise their views with the full understanding that those views may cause offence to others. In other cases, employees may not always appreciate the impact of their words, or simply not give it any thought.

Some steps to consider:

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- It is important to have very clear equality and diversity policies setting out what behaviour is and is not acceptable, including the consequences of not adhering to the same - but it is equally important that employees are aware of the same and can easily access it – there is no point in having the perfect policy hidden away!
- Your leaders and managers set the culture and “behavioural compass” – make sure that they are modelling the correct behaviours.
- Training on equality and diversity issues should not simply be a tick-box induction process exercise – it should be an ongoing process, adjusted as appropriate for their particular position within the organisation.
- Act quickly and consistently in the event of issues being raised – don't let conflicts fester in the hope that they will simply blow over.

- Remember employment doesn't just start and end with clocking on and off times – the employment relationship can extend to work social events and out-of-hours communications. It can also include social media posts – having a clear policy about what posts are acceptable (and enforcing the same) can head off conflicts before they arise.

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